

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

)	CIVIL FILE
Donald Sanders,)	NO. 17-CV-5106 (ECT/KMM)
)	
Plaintiff,)	
)	VOLUME I
vs.)	
)	
BNSF Railway Company,)	Courtroom 3B
)	Monday, December 6, 2021
Defendant.)	St. Paul, Minnesota
)	8:45 A.M.

JURY TRIAL PROCEEDINGS

**BEFORE THE HONORABLE ERIC C. TOSTRUD
UNITED STATES DISTRICT JUDGE
AND A JURY**

A P P E A R A N C E S:

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1 (8:45 a.m.)

2 P R O C E E D I N G S

3 I N O P E N C O U R T

4 THE COURT: Good morning, everyone. Please be
5 seated.

6 MR. JIM KASTER: Good morning, Your Honor.

7 THE COURT: This is Sanders versus BNSF Railway
8 Company, Civil File Number 17-5106.

9 Counsel, I understand there are a number of
10 issues -- or a couple of issues I should say -- that we need
11 to deal with before we call in the venire.

12 MR. LUCAS KASTER: That's correct, Your Honor.

13 THE COURT: Mr. Kaster.

14 MR. LUCAS KASTER: Sure. The one issue we wanted
15 to address was just follow-up to the Court's hearing on
16 Friday regarding the foundation for the recordings that we
17 intended to play. We sent a declaration to Defendant
18 yesterday from our IT tech person that outlined what she
19 did, how she captured the information, how that was
20 recorded. Then on a summary sheet that was produced to
21 defendant back in April 2020 -- the actual recordings
22 themselves were produced in April of 2018 -- that lays out
23 where she got the length of the recordings, the date, the
24 time. And so we're hoping -- and we e-mailed that
25 information to the Court as well, so the Court was aware of

1 that. We hope that that resolves any foundation issues.

2 THE COURT: Who's going to be addressing that one?
3 Ms. Ferguson.

4 MS. FERGUSON: Yes. Thank you, Your Honor.

5 We continue to assert there is a lack of
6 foundation. We've listened to every one of those tapes, and
7 nowhere on the tape is there any indication as to the time
8 or date. So we're being asked to rely upon somebody in
9 Mr. Kaster's office as to the date and time of these.

10 This is a case that -- temporal proximity is
11 important here, and we have no independent way of knowing
12 whether those dates and times are accurate. So we continue
13 to take the position we did in our motion *in limine*.

14 THE COURT: Was this an issue that was raised
15 during discovery?

16 MS. FERGUSON: We actually asked to have the
17 recorder, and we were refused because discovery was over.

18 THE COURT: Okay. So it sounds like the question
19 of trying to resolve the basis for this objection was -- I
20 guess was that issue that was raised during discovery?

21 MS. FERGUSON: We raised foundation through the
22 entire -- every deposition that was taken where these tapes
23 were played that issue was strongly contested.

24 THE COURT: I guess maybe what I'm asking is this:
25 It seems like BNSF's challenge is to the substance of the

1 affidavit that was filed.

2 MS. FERGUSON: Yes, as well as the tapes. I mean,
3 if the tapes had any indication as to a date or time -- but
4 completely absent.

5 THE COURT: Well, from where I sit Mr. Sanders has
6 laid adequate foundation for those tapes, at least to the
7 extent that that affidavit addresses those issues. I can
8 imagine there might be other issues that might surface upon
9 which BSNF might raise an objection to those tapes. But
10 beyond that, I just don't see a basis to sustain that kind
11 of objection given the information that's since been filed.

12 So I guess what I'm saying is to the extent the
13 objection is to any substance in that affidavit, the
14 objection's overruled. I'm not quite sure how else to
15 address that issue.

16 MS. FERGUSON: Well, we'll just maintain for the
17 record our objection as it relates to the recordings as
18 lacking foundation.

19 THE COURT: All right. But there's two sides to
20 this foundation problem that I can think of. And you all
21 tell me if you think I'm missing something.

22 One piece is how did the stuff that was produced
23 in discovery, how was it created. The second piece is
24 asking Mr. Sanders the who, what, when, where, why, and how
25 for each of those recordings. Right? Tell me, when did you

1 make this recording, why did you make it, et cetera. I
2 mean, that's a different issue. And as I understand it,
3 that's not something that the affidavit addresses, at least
4 entirely.

5 So I guess what I'm saying is fine as to a
6 standing objection as to foundation with respect to the
7 information that's addressed in that affidavit, but to the
8 extent that there are other foundational objections that
9 might be raised, I just want to be clear that those are
10 things you're going to have to assert in realtime if you
11 continue to think that those are viable objections.

12 Any other issues that we need to deal with here
13 today?

14 MR. LUCAS KASTER: None from us, Your Honor.
15 Thank you.

16 THE COURT: How about from BNSF?

17 MS. DONESKY: Your Honor, we wanted to follow up
18 or at least make a record, at minimum, but raise with Your
19 Honor an issue that arose, obviously, on Saturday where we
20 spoke, and then Your Honor issued an additional ruling
21 yesterday regarding Mr. Jones as a corporate representative.
22 And I understand it's a difficult situation the Court is in.
23 We all understand that. Certainly no one wants the trial
24 further delayed, but there are a couple issues we at least
25 need to preserve a record, but we want to make objections to

1 Your Honor in terms of not just the remote testimony for
2 Mr. Jones, but him being here as a corporate representative.

3 We understand, obviously, this is not a criminal
4 trial, but there is a concept of being able to confront
5 one's accuser. And Mr. Jones is clearly the witness or the
6 individual at BNSF who is the main witness for whom
7 Mr. Sanders has made allegations against primarily. He's
8 the primary witness in that context.

9 And now, on the first day of trial, and of no
10 fault of anyone, unfortunately, he's not able to be here for
11 COVID reasons. But there is now -- as of yesterday, he's
12 also not permitted to appear here as a corporate rep and,
13 therefore, the individual who's in the situation with these
14 allegations presented against him and the person most
15 factually close to the facts of the case is not able to now
16 hear the information that is coming in at trial for the next
17 two weeks. And for those reasons we request and would
18 continue to renew our request that we made Saturday that he
19 be permitted, at minimum, to testify at a later time.

20 We have two weeks of trial. He would be available
21 Friday to speak and to testify in court and, at minimum,
22 remotely as corporate rep to be -- I understand the
23 technology complications that might present, but there is a
24 level of prejudice here to the defendant given the
25 circumstances. And if there's any way that he could appear

1 or at least orally -- there's a phone call, conference call
2 that he could, at minimum, be allowed to listen in on, that
3 there be some considerations there because, given his role
4 and the accusations being made, he should have the right and
5 BNSF should have the right to have him here and for him to
6 be able to hear the testimony as it comes in throughout
7 trial.

8 THE COURT: Okay. Let's take those issues sort of
9 one at a time and break them out.

10 On the testify later piece, so I'm going to
11 interpret that as a motion that Mr. Jones be allowed to
12 testify later. And as we talked about on Saturday, I think
13 it was, I'll deny that motion for the simple reason that it
14 raises just as much risk to wait as it does to put Mr. Jones
15 in the position of having to testify remotely. Other
16 witnesses are testifying remotely. I understand Mr. Jones
17 is an important witness, but there's nothing inherently
18 wrong with remote testimony.

19 I worry about our technological capacities and
20 potential glitches there, but we'll cross those bridges if
21 and when we get to them.

22 But given Mr. Jones' circumstances, it seems to me
23 that there is just as much a risk or greater risk, if
24 anything, in waiting and allowing him to testify later. He
25 may become sick, incapacitated, unable to testify in which

1 case the trial would be delayed. And I'm not going to --
2 I'm not going to take that risk on with respect to his
3 testimony.

4 With respect to having a corporate representative
5 testify or present, I think there are two issues there.
6 One, I haven't heard any explanation for why BNSF couldn't
7 identify a substitute corporate representative.

8 I understand that Mr. Sanders is the important
9 person here and that he is the subject of these complaints.
10 I get that. But insofar as the corporate representative
11 piece is concerned, I haven't heard any explanation or
12 justification for why someone else couldn't take his place.

13 With respect to him being unable to observe the
14 testimony of any other witnesses who are present here, I'm
15 sensitive to that concern. I think it's a significant one.

16 Do you have authority that suggests that I am
17 violating Mr. Sanders' or BNSF's rights in some fashion by
18 proceeding with trial in his absence?

19 MS. DONESKY: I don't at this very moment. We
20 read the ruling last night. I don't at this very moment. I
21 would seek leave to present that to Your Honor.

22 THE COURT: Well, but I mean, I think we talked
23 about it on Saturday. And I get it, I understand it, but I
24 don't -- I am not aware of any authority in a civil case
25 that requires a trial to be delayed under circumstances

1 comparable to this, so that an individual may be present to
2 exercise something akin to a confrontation right, a Sixth
3 Amendment confrontation right. If you find it and get it to
4 me, that's important. I'd want to see it.

5 MS. DONESKY: Okay.

6 THE COURT: So I'm not suggesting that I'm
7 shutting that out, but --

8 MS. DONESKY: On Your Honor's first point, just so
9 there's a record of that just in terms of identifying anyone
10 else, as Your Honor probably heard Friday and the record
11 reveals, there's -- many of the individuals in this case
12 have either retired or left BNSF. And just the mere timing
13 of the situation arising we were not able to find another
14 corporate representative and had identified Mr. Jones as
15 being that. So the challenges there are both timing and who
16 is involved and who remains at BNSF.

17 THE COURT: Well, I mean, on that point, I get it.
18 It's not as though there's someone there who has -- apart
19 from Mr. Jones who may have personal, firsthand knowledge of
20 everything that's gone on here, but we just wrapped up a
21 trial about month or so ago and the corporate representative
22 had the least involvement of any individual who testified on
23 behalf of the defendant. It just so happened that that
24 individual was the higher-up in the company who had primary
25 frontline responsibility for monitoring the case and its

1 progression. And I certainly think that that's not an
2 uncommon way to handle that circumstance.

3 All right. I had one other issue there that I
4 wanted to deal with. Ah, the telephone conference piece.
5 Probably because we've been so used to Zoom now, but I
6 confess I didn't think about that, and I'm not sure it was
7 suggested when we talked on Saturday; if it was, I
8 apologize, I just missed it, but that might present a
9 different issue. Let me look into that.

10 MS. DONESKY: Thank you, Your Honor.

11 THE COURT: That sort of old-fashioned technology
12 isn't something that's front of mind now after the last 18
13 months or so, and it should be. So I apologize for that.
14 As I said, if it was brought up on Saturday, I missed it.

15 All right. Anything further from BNSF?

16 MS. DONESKY: The only other item, Your Honor --
17 and you may want to take it up later -- each party has
18 exchanged proposed limiting instructions per Your Honor's
19 request on Friday. So we can take that up later if you
20 want. We just wanted to make you aware that we can provide
21 each of our respective ones to each or we could speak and
22 maybe we can reach a joint language, but we've each
23 exchanged language.

24 THE COURT: Okay. Good. I appreciate knowing
25 that you've exchanged that. And this is with respect to the

1 limiting instruction regarding the administrative
2 proceedings?

3 MS. DONESKY: Correct. And the arbitration, yes.

4 THE COURT: Yes. Right. And the arbitration,
5 correct. Okay. Terrific.

6 If I'm hearing you right, you're suggesting
7 perhaps there's some room for the parties to continue to
8 talk and work something out. If that turns out not to be
9 possible, what I'd ask is that you submit both instructions
10 so that I can look at them before and consider them for at
11 least a short period of time before we argue about them here
12 in court.

13 MS. DONESKY: Very good.

14 THE COURT: Okay. All right. Thank you.

15 (Discussion off the record between Court and
16 clerk).

17 THE COURT: All right. So the first eight jurors,
18 for everyone's information, who will be in the courtroom to
19 start with are Mr. Grimwood, Ms. Esposito, Mr. Leech,
20 Mr. Martinson, Mr. Thompson, Mr. Cohen, and Ms. Dube,
21 D-U-B-E. Could be "Dube." We will find out.

22 MR. JIM KASTER: So we're clear, Your Honor, you
23 skipped over Ms. Williams and -- or Mr. Williams --

24 THE COURT: I did.

25 MR. JIM KASTER: -- and Mr. Sanders. Okay.

1 THE COURT: I did.

2 MR. JIM KASTER: Yeah. Thank you.

3 THE COURT: All right.

4 MR. JIM KASTER: Your Honor, if the Court is
5 bringing the jury right in, I'm wondering if I could have
6 three minutes before we start.

7 THE COURT: We're just waiting on one piece of
8 information here. Sorry.

9 (Pause)

10 THE COURT: We've got just a couple of things to
11 figure out here in terms if individuals are no-shows or if
12 they were instructed to show up later. That's what we're
13 trying to figure out now.

14 But, Mr. Kaster, if there's something you need to
15 take care of, I suspect now would be a good time

16 MR. JIM KASTER: Okay. Thank you. Thank you,
17 Your Honor.

18 THE COURT: Certainly.

19 MR. LUCAS KASTER: Your Honor, are you okay if
20 we're able to drink water bottles while we're in the
21 courtroom?

22 THE COURT: I am.

23 MR. LUCAS KASTER: Thank you.

24 (Pause)

25 MR. JIM KASTER: Thank you, your Honor.

1 THE COURT: All right. Let me give you a heads-up
2 on something. We've got a number of no-shows. So of the 32
3 summoned jurors, 24 have shown up today at the appointed
4 time. Looking at the list and who has not appeared, I find
5 that surprising. I am thinking that there's something else
6 going on, that perhaps these individuals were under the
7 belief that they reported later or at a different time, but
8 that's just an educated guess.

9 (Court confers with the courtroom deputy)

10 THE COURT: All right. So we think what happened
11 is there was a glitch in our -- the same calling program
12 that every federal district court or most every federal
13 district court uses when alerting jurors. And it sounds as
14 though there was some kind of glitch, and either some of
15 these individuals were left off, others may have been not
16 given a time when to report and, obviously, in some
17 circumstances -- well, we don't know which of those two it
18 could be.

19 I suspect that 24 will be enough and we can get to
20 14 from 24 based on my review of the questionnaires, but
21 we're going to call those individuals anyway and try to get
22 them in here as quickly as possible just in case.

23 Then we're prepared, correct? Is Plaintiff
24 prepared to proceed?

25 MR. LUCAS KASTER: Yes. Yes, Your Honor.

1 THE COURT: BNSF?

2 MS. FERGUSON: Yes.

3 THE COURT: All right. Thank you.

4 (Pause)

5 (Jury venire enters the courtroom)

6 * * * *

7 [Jury Selection commences, not transcribed]

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1 (2:55 p.m.)

2 IN OPEN COURT

3 (Jury enters)

4 THE COURT: Thank you, everyone. Please be
5 seated.

6 Mr. Kaster.

7 MR. JIM KASTER: Thank you, Your Honor.

8 **PLAINTIFF'S OPENING STATEMENT**

9 MR. JIM KASTER: May it please the Court, counsel,
10 Ladies and Gentlemen of the Jury:

11 Don Sanders got fired for standing his ground,
12 standing his ground doing the right thing, doing what was
13 required by BNSF's written policies (indicating) and what
14 was required by the law.

15 See, Don Sanders was a track inspector. As a
16 track inspector, he was the eyes and ears of the public, of
17 BNSF, of the Federal Railway Administration, to keep the
18 tracks safe. To make sure they were safe from defects, he
19 would issue -- defects like in the track, or the ties, or
20 the frog --

21 Am I doing that?

22 THE COURT: You are.

23 MR. JIM KASTER: Okay. I'm going to try to stop
24 doing that. Okay. Or what's called a frog when the tracks
25 come together and then split apart. These defects -- and he

1 would issue slow orders and maybe take a track out of
2 service. These defects can cause derailments, serious
3 derailments of trains that weigh hundreds, if not thousands,
4 of tons, cause accidents, cause property damage and worse.

5 His reporting of these slow orders had this
6 effect: It slowed down train traffic. It hurt the one
7 thing that BNSF cares the most about, velocity, which is how
8 they make their profit. And so when he did that, managers
9 became angry. They would scream at him, threaten him, swear
10 at him, curse at him in the day and during the night, during
11 the middle of the night.

12 Don Sanders and his wife Christine are separated,
13 but he talks on a speakerphone because he doesn't put the
14 phone to his face, so his wife could hear these calls. They
15 were relentless.

16 So finally in November of 2015, Don Sanders went
17 to HR and he made a complaint. He had recordings of some of
18 the calls. He gave the recordings to HR.

19 It didn't get better. It got worse. He tried to
20 transfer to another district and he was told that his
21 reputation preceded him. It didn't get better. It seemed
22 to get worse. So he stayed in that district for only ninety
23 days or a little bit less. And then when he transferred
24 back to his old district, within four days -- four days --
25 they rented a car, an unmarked rental car, and sat across

1 the tracks, his supervisor, and spied on him and contended
2 that he put more time on his daily log than he actually
3 worked for three days: March 19th, March 25th, and 26th of
4 2016. They accused him of payroll theft and fired him after
5 nine years because Don Sanders stood his ground, a payroll
6 that had not even closed yet. It hadn't even closed when
7 they marched him off the premises.

8 So let's talk about this story in a little more
9 detail. Let me introduce some of the characters, the
10 witnesses that you will see in this case, key names. Keith
11 Jones, who was the division manager, Don Sanders' boss's
12 boss. You'll hear from Mr. Jones -- the Court told you that
13 Mr. Jones is quarantined, so we will see him as a witness
14 shortly on the big screen. He's apparently at his home. So
15 he was the boss's boss.

16 Don Sanders' supervisor for most of his time was
17 the woman in the right-hand corner, Blaine Hoppenrath. In
18 the top right is Doug Jensen. He was Mr. Jones' boss. And
19 Steve Chartier was the supervisor for that short period of
20 time when he went to Northtown, the 90-day period. Now we
21 have Don Sanders, the track inspector.

22 Don Sanders, the evidence will show you, was a
23 hard worker. He left home at the age of 16. He has worked
24 at gas stations, bakeries, construction companies. He
25 worked at the Ford plant until it closed. The Ford plant,

1 St. Paul, we all recall that it closed in 2007. It was then
2 that he went to BNSF and started working as a track laborer.

3 In 2010, he would get what he describes as the
4 best and most important job that he ever had as track
5 inspector. He worked as a track inspector for six years.
6 Even Blaine Hoppenrath admits that he was good at track
7 inspecting, very good at identifying defects.

8 He actually would befriend the Federal Railway
9 Administration local representative who would walk with him
10 and make sure that he understood how to identify defects.
11 He got tier one, tier two, and tier three training. He
12 carried this (indicating) book with him, which is the "Track
13 Safety Standards" by the Code of Federal Regulations. He
14 looked at this book and consulted this book to make sure
15 that he was following the law when he made these reports.

16 This is important work. Don Sanders will tell you
17 that his byline was if you see something, say something,
18 what we see at the airport. He can be charged with a
19 willful violation of this law for failing to report. He's
20 required to make these reports when he sees a track defect.
21 He thought of himself as being in the business of saving
22 lives.

23 And he was very diligent because he had seen the
24 results of the property damage. He knew these trains go
25 through the neighborhoods. You see, BNSF in this area owns

1 the track. It's their responsibility to keep it safe -- not
2 just for BNSF, but for the neighborhoods it goes through for
3 transportation: Amtrak, the passenger trains. He's keeping
4 it safe for all of those people, and he thought of this as
5 extremely important work.

6 And he tried to get it right. As I said and even
7 Blaine Hoppenrath will say, he was very good at identifying
8 defects. See, because track inspectors sometimes get called
9 out on the track in middle of the night for the most tragic
10 circumstances. And Don had seen these accidents. And he
11 went to the track many times and found human body parts.

12 So he knew what was at stake when he was
13 inspecting track. He knew how important this work was. And
14 when I say he worked hard to get it right, he worked hard.
15 In 2015, he worked by the records -- and we'll show you some
16 of these records. They're not that easy to read, as you can
17 see. You have to sort of blow them up. But when you look
18 at the records in detail, what you see is that he worked 310
19 days in 2015. So if we break it down in that time frame,
20 July of 2015 he works every day but one, every single day.
21 August of 2015 he works every single day. September of 2015
22 he worked every single day.

23 They were short-staffed for track inspectors and
24 there was a reason for that. It's a very high-pressure job.
25 When you report a defect, especially on a weekend, your

1 co-employees have to come out and fix the defect sometimes
2 at odd hours, sometimes in the middle of the night.

3 And when you're reporting defects and taking
4 tracks out of service, you're hurting the one thing they
5 care most about: velocity. And you hear about it. Don
6 Sanders heard about it.

7 In the latter part of 2015, a couple things are
8 happening. First of all, all the oil that's coming from the
9 Bakken area of North Dakota, which the trains were hauling a
10 great deal of, was slowing down. There was pressure to
11 increase revenue, and that pressure trickled down to Don
12 Sanders as a track inspector. He was challenged, screamed
13 at, sworn at. And, as I said, his wife -- and they're
14 separated now, but she'll testify in this case -- was a
15 witness to these conversations. She heard them on the
16 speakerphone; others did as well. But, as I mentioned, he
17 has recordings of some of these calls.

18 So he went to HR in November of 2015 and reported
19 them. December 7th is when he met with human resources. He
20 played the phone calls for them, some of the calls.

21 This complaint is supposed to be confidential. A
22 couple things happened. First of all, they tell him his
23 complaint of harassment and retaliation is not sustained.

24 Mr. Jones receives a letter of coaching, a
25 coaching letter. Mr. Jones, when Mr. Sanders gets fired,

1 gets a congratulatory message in writing, and orally he's
2 congratulated for firing Don Sanders.

3 But this complaint that's supposed to be
4 confidential, this is what happens after he makes the
5 complaint: They take his truck away, his work truck away,
6 which because he has to go to different locations makes his
7 job that much harder. They change his hours, and they send
8 him home. They bring other people out to do his job.

9 So he decides to transfer. He decides I need to
10 do something when HR tells him that, and he transfers to
11 Northtown. Within a few days, he reports slow orders
12 because there's frogs -- that area of the track that comes
13 together -- that need repair. And these are particularly
14 sensitive areas.

15 He's called by Mr. Chartier, who calls a co-worker
16 and then calls him. And, again, Don is on the speakerphone
17 so this call can be heard. And pardon me for this, but
18 Mr. Chartier says to him, You're not going to pull the same
19 shit in this area that you pulled at Dayton's Bluff, and
20 screams at him for making these reports, these reports that
21 are required.

22 So he doesn't stay very long, because it doesn't
23 get better when he transfers. It actually seems to be
24 getting worse. And he's now in an area that he doesn't
25 fully know. So that's more uncomfortable. So he decides to

1 go back to Dayton's Bluff. He is back there -- the first
2 day he's back there is March 15th of 2016, and then things
3 start happening very quickly.

4 But before I get to that key time frame, let me
5 talk to you about how the time entry system worked, because
6 this is important. There's no time clock or at least there
7 wasn't at the time at BNSF. They didn't have a place on
8 your phone you could push or anything like that. You
9 reported your own time on a sheet of paper. And you were
10 supposed to report it every day, but a lot of times you were
11 there working late at night, you didn't work the amount of
12 time that you thought you were going to work, you'd have to
13 go back and then put your time in.

14 So what people did and what you will hear was the
15 custom and practice of the employees at the time was they
16 would put in their time for a daily entry and then go back
17 and amend it, modify it before the payroll closed to make
18 sure that the time entries were correct. People routinely
19 did that. It is undisputed in this case. Blaine Hoppenrath
20 admits that employees could do that. When she was asked if
21 they could do that, she said simply, "Yup." No exceptions,
22 yes. You go back and modify your time before the payroll
23 closes to get it right.

24 So how does this work? You enter your time in a
25 self-report. You go back before the time closes. You could

1 even amend your time after the payroll closes. But you
2 could clearly do it -- undisputed you could do it before the
3 payroll closed.

4 So what are the policies that were in place, the
5 practices and policies that protected people around this
6 self-reporting of time? First of all, the employee could
7 change his time, undisputed. The employee -- the supervisor
8 would review the time before payroll closed. That's number
9 two. Three: Typically, the supervisor would call the
10 employee if there was an issue about a time entry or two or
11 whatever. They'd call and talk to him.

12 The Collective Bargaining Agreement requires
13 notice to the employee of any problem with their time,
14 notice that, "I don't think you worked these three hours on
15 that day, Joe. Let's talk about that."

16 There was also a common practice called a cut
17 letter. And you could get a cut letter even months after
18 the payroll closed. Employees might get a cut letter three
19 months later saying we're cutting your time for this. We
20 don't think you worked all of those hours that you
21 self-reported on that time sheet.

22 And, by the way, changing your time is
23 specifically outlined in a policy, a written policy by BNSF.
24 It tells you how to change your time as an employee.

25 And then if you were called up on discipline, they

1 might give you a waiver. In fact, for Mr. Jones --
2 Mr. Jones, who I talked about before, who was the
3 supervisor's supervisor -- has investigated and disciplined
4 two other employees for so-called time theft before, giving
5 both of them a waiver from discipline. Mr. Sanders was not
6 offered a waiver.

7 BNSF will offer you evidence about, well, in this
8 other place at this other time, different employees have
9 been terminated. We know very little about those cases.
10 What we do know is Mr. Jones had two similarly-situated
11 people that he disciplined and treated completely different.

12 So March 15th, this is sort of the heart of the
13 matter, March of 2016. Mr. Sanders arrives back at Dayton's
14 Bluff on the 15th.

15 March 18th, a Friday, Ms. Hoppenrath decides to
16 ride along with him as his supervisor and rides with him
17 doing the track inspection. Nothing remarkable happens on
18 the tracks. She admits he's good at track inspecting. But
19 she says he told her that he wanted to leave early that day.
20 And he was supposed to leave at 3:00 -- or she said, He told
21 me he was going to leave by 3:00. And she looked around at
22 3 o'clock and he wasn't there, apparently, and so she says
23 she became suspicious that day for the first time that he
24 was writing down more time than he was actually working.

25 The next day, March 19th, a Saturday, Mr. Sanders

1 is working alone track inspecting. On that day, across the
2 tracks in an unmarked rental car is Blaine Hoppenrath. Her
3 entire job, apparently, is to watch Mr. Sanders to see if
4 anything is amiss. She says she didn't see him at 8:30.
5 The evidence is going show that she was surfing the Internet
6 at 8:30 and posting on Instagram while she was apparently
7 surveilling Mr. Sanders.

8 Mr. Sanders actually went to Bridal Veil to clean
9 out his locker before he started his regular shift or
10 started his regular work that day. That was part of his
11 work, but she told him he couldn't have a locker at Bridal
12 Veil. Remember, he's just coming back to Dayton's Bluff.

13 She says she got suspicious enough that she
14 continued the unmarked car surveillance from across the
15 track.

16 On March 25th, the Friday before Easter, Sanders
17 is working alone track inspecting. This is Good Friday to
18 some. Mr. Sanders is going through some marital
19 difficulties at the time, says in retrospect -- said at the
20 time, "I probably shouldn't have been going in that day."
21 There's a full day entry for that day. He did not work a
22 full day.

23 March 26th, the Saturday before Easter, Sanders is
24 again working alone track inspecting. Again, there's a
25 full-day entry in for that day. He did not work a full day.

1 He intended to change those in accordance with the normal
2 practice, and payroll had not closed. He has always said
3 that. He has never said anything else.

4 March 28th. March 28th, that Tuesday [sic].
5 Mr. Sanders doesn't go in on Monday, March 28th -- or that's
6 a Monday, I'm sorry, March 28th. BNSF drafts notices of
7 investigation seeking termination of Mr. Sanders for payroll
8 theft, a payroll that has not even been paid yet.

9 In this case they're going to talk about it as
10 time theft, because the payroll hasn't been paid when they
11 accused him of theft.

12 March 29th Mr. Sanders goes in early in the
13 morning. He was always on time. He was never late. He
14 gets there early. There's a lot of hustle and bustle. He's
15 starting his workday, starting to make entries. And they
16 give him a notice of investigation seeking job termination
17 and publicly accuse him of payroll theft and walk him out of
18 the station house before the payroll has even closed.

19 April 1st the payroll closes for the last period
20 of March.

21 What's the legal construct for this case? The
22 Court has already given it to you. Mr. Sanders has to prove
23 that his protected activity -- his reporting of these
24 defects, his engaging in protected activity reporting to
25 human resources, that's the protected activity; his

1 reporting of defects which were required by this
2 (indicating) law, this handbook he carried, and making the
3 report to human resources, that that played a part in their
4 decision to terminate him in whole or in part.

5 If he proves that, then the burden shifts to BNSF
6 to prove that they would've made the same decision anyway.
7 Mr. Sanders has to make out his burden by a preponderance of
8 evidence. BNSF has to meet their burden by clear and
9 convincing evidence. How will Mr. Sanders demonstrate this
10 in this case, that it was a contributing factor?

11 They gave him no opportunity -- these are all
12 standard practices. They gave him no opportunity to modify
13 his time. Actually, on that Tuesday, March 29th, he tried
14 to get his time right. They escorted him off the property.
15 He still tried to get it right. He knew it wasn't right.
16 And they blocked him. They specifically blocked him from
17 putting in the correct entries. No conversation with him,
18 no asking Don.

19 And, by the way, what we're talking about in the
20 evidence in this case for a man who worked 310 days and
21 every day of August and September, we're talking about less
22 than seven hours. Six hours and 45 minutes is what they
23 contend that he put down on his daily sheet that he did not
24 actually work. No conversation about that. No notice to
25 him required by the Collective Bargaining Unit. No cut

1 letter. Nothing from BNSF saying, you know, we're just not
2 going to pay you for this extra time. This doesn't look
3 like time you actually worked. No offer of a waiver, which
4 was offered to similarly-situated people working for Keith
5 Jones.

6 That same evidence will go to the issue of whether
7 or not they can possibly meet their burden of the same
8 decision. What they will say: Well, they will tell you
9 that there was a fair and impartial hearing, a union hearing
10 where Mr. Sanders was found to have violated policies and
11 the terminations were upheld. Remember I said they gave him
12 notices of investigation. They actually gave him two
13 notices of investigation.

14 This is how that hearing works: There's no
15 discovery. You walk in. You don't know what the company is
16 going to say. You have no right to subpoena witnesses. If
17 some of your co-employees decide that they're going to come
18 and testify for you against the company in front of the
19 managers, they don't get paid.

20 If the company calls the witnesses and they want
21 people to come, they come in and testify for the company
22 against Mr. Sanders, they do get paid.

23 You have no right to a lawyer. You get a union
24 representative. No one is placed under oath. And the judge
25 in the case is a member of the management of BNSF. That's

1 the sole judge, a BNSF manager. As you can imagine, very
2 few employees win these hearings.

3 And what we'll be talking about in this case, by
4 the way, is intentional discrimination. At the end of the
5 day, it's not an accident. It's intentional.

6 The notices of investigation: There were two, one
7 for the 19th, and the evidence I think will show you he
8 worked the entire day that he put down; and one for the 25th
9 and 26th. They were coming after him with both barrels.
10 Each one of them gave rise to a different hearing making
11 sure -- as Mr. Sanders is never offered a waiver -- making
12 sure that Mr. Sanders will be terminated.

13 They also say that Fort Worth reviews those
14 investigations. Just like the hearing officer, the Fort
15 Worth person is a BNSF employee looking at whether another
16 BNSF manager has made, in their view, some kind of mistake.

17 They will say that Mr. Sanders tried to change his
18 entries on the 29th and that that demonstrates his guilt.
19 Mr. Sanders was trying to get the time right. That was what
20 he planned to do all along. He has always said that. He
21 has always said that. Those were placeholder entries. They
22 were not correct. He has never maintained anything else.

23 And what was more significant about that sequence
24 is when they discovered he was in getting his time right
25 before the payroll closed, they shut him out. They wouldn't

1 let him put in the correct time entries.

2 They will also say that Mr. Sanders recorded these
3 conversations and therefore he cannot be trusted.

4 Mr. Sanders did record conversations because he was afraid
5 for his job, because people were telling him things orally
6 that they would not put in writing, and he had lost trust.
7 So, yeah, he did record the conversations.

8 There's a Latin term, ad hominem, which just means
9 at the person. It's not about the argument. It's at the
10 person. And I ask you to consider that as we go through the
11 case.

12 Before, way before, or way after are we talking
13 about what happened? When BNSF raises questions, are we
14 talking about what happened in the sequence or are we
15 talking about something that happened long ago or before or
16 something that happened after? And why are we talking about
17 that?

18 On the issue of damages, if Mr. Sanders proves his
19 case, he's entitled to damages. He's entitled to back wages
20 to the date of this trial if you determine that those are
21 appropriate.

22 And I think they're going to say that he should've
23 tried harder or gotten a different position or did more.
24 Mr. Sanders has a family and children and responsibilities,
25 and he is a hard worker. And the evidence will show you he

1 went through many jobs trying to replace the good and
2 important job that he had at BNSF. He went through many
3 jobs. He has done the best he could.

4 There's also one other component of damages for
5 you to consider and that's emotional distress. And they
6 will say, well, he has other stressors in his life. He has
7 heart problems; he does. He has health issues. They'll
8 say, well, he smokes or has smoked; shouldn't do that. All
9 of that's probably right. At the end of the day what
10 Mr. Sanders is here for is he lost the best and most
11 important job he ever had, marched out in front of his
12 co-workers, sent home to talk to his family about being
13 terminated for payroll theft before the payroll even closed
14 because he stood his ground.

15 Thank you.

16 THE COURT: Ms. Ferguson.

17 MS. FERGUSON: Thank you, Your Honor.

18 **DEFENDANT'S OPENING STATEMENT**

19 MS. FERGUSON: May it please the Court, counsel,
20 Members of the Jury:

21 This is a case about time theft and time theft
22 alone. Despite the effort to divert your attention, it's
23 about time theft.

24 Mr. Sanders was dismissed after two investigation
25 hearings produced evidence that established that he

1 falsified his payroll not once, not twice, but three times.

2 So you'll hear from various people throughout the
3 next several days. Blaine Hoppenrath was his supervisor in
4 March of 2016, and she'll come here and testify and tell you
5 why she became suspicious and why she began to follow
6 Mr. Sanders. And she'll tell you that on March 18, 2016
7 Mr. Sanders told her, "I have to leave by 3:00."

8 Now, track inspectors work very independently.
9 They're not followed. But something caused her to want to
10 follow him, and that was he was gone before 3:00. But when
11 she looked at the time records, he billed payroll for a full
12 eight hours, and she thought that's not right, I'm going to
13 check and see, so on March 19 she did. She did just that.

14 Now, Mr. Sanders' home terminal at that point was
15 Dayton's Bluff. So she got to Dayton's Bluff at 8 o'clock.
16 His typical hours were 7:00 to 3:00. His car wasn't there.
17 The hi-rail truck -- you'll hear about how they do track
18 inspecting, and they use a hi-rail truck. And before they
19 begin inspecting, they get authority to be on the track.

20 So his truck wasn't there. The hi-rail wasn't
21 being used. So she went back at 8:30. No sign of him. She
22 went back at 9:15 and she saw his vehicle in the parking lot
23 and the hi-rail was being warmed.

24 He worked that day from 9:15 -- or she observed
25 him from 9:15 until 1:53, less than five hours. But yet he

1 submitted a payroll entry that day as final -- in final
2 form, not a draft -- for eight hours.

3 So she said to her boss, Keith Jones, What should
4 I do? And Mr. Jones said, Call Labor Relations. They can
5 direct you. And Labor Relations said, Why don't you follow
6 him another time just to make sure this wasn't a fluke, and
7 so she did.

8 And so she followed him on March 25. He arrived
9 that day at Dayton's Bluff at 7:00 a.m., and he left at
10 10:13, three hours and 13 minutes later. But he marked his
11 time that day as final at 8.5 hours.

12 So she followed him again the next day. This time
13 she didn't see him arrive on March 26th, but he left at
14 10:56 in his personal vehicle. And the track records
15 indicate that he didn't track inspect for more than 2.5
16 hours. But that day he put nine hours of work as final.

17 So based on this information, these three days of
18 payroll falsification, an investigation was held.

19 So what you need to know about this process is
20 that Mr. Sanders as a track inspector is a member of the
21 union. And you'll hear about a Collective Bargaining Unit
22 that gives Mr. Sanders rights that other employees that
23 aren't union members don't have.

24 He has a right to notice of an investigation. He
25 has a right to representation. He has a right to call

1 witnesses. He has a right to present evidence. He has a
2 right to appeal. He had all of those rights as a union
3 member.

4 And, interestingly enough, after the first
5 investigation notice is issued and before the hearing,
6 Mr. Sanders goes in and changes his time from March 25th.
7 But instead of getting it right, he gets it wrong. He
8 changes his time to 4.5 hours, but, again, he only worked
9 three hours and thirteen minutes.

10 So then again he did the same thing for the next
11 day, March 26. He changed his time that day and removed one
12 hour of overtime but still charged eight hours.

13 So you'll hear about two hearings that are held.
14 And Mr. Sanders, I expect, will tell you that his position
15 was at that first hearing, well, I wasn't at Dayton's Bluff.
16 I was at Bridal Veil cleaning out my locker. And he
17 presented at the investigation GPS records which showed
18 where his truck was. But guess what, there's no record of
19 it being at Bridal Veil. And he says: You know, after I
20 left Bridal Veil, I got in my own vehicle and I inspected
21 track. But there's no record of any track authority that he
22 had before 9:00 that day.

23 He went to the next hearing on April 8, and what
24 he said as to the March 25 time entry, I was wrong. But I
25 wanted to change it. But he changed it and he still got it

1 wrong. Same thing with March 26: He knew he entered the
2 incorrect time.

3 Now, the decision to terminate doesn't end with
4 the investigation. What happens at BNSF, they cannot
5 terminate an employee without a multi-step review process,
6 and that's what was held here.

7 So the first step in the process after the
8 investigation was Mr. Jones looked at the transcript. And
9 based on what he saw, both the investigations, he
10 recommended termination.

11 That decision then went to his boss, Doug Jensen.
12 Doug Jensen recommended termination. And then the next
13 person in the process is a person in Labor Relations at Fort
14 Worth, Texas.

15 Stephanie Detlefsen is going to come here and
16 testify and tell you what she does when she reviews
17 transcripts and is involved in the decision of termination.
18 And she says, I don't care what anybody else says. I don't
19 care about Keith Jones' recommendation. I'm going to review
20 the transcript and make sure that it supports dismissal.
21 And she said in this case it supported dismissal.

22 So it didn't end there, though. So you'll hear
23 the union rep that represented Mr. Sanders, John Mozinski.
24 He appealed this decision to BNSF, and the decision to
25 terminate was upheld. And then it was appealed to another

1 entity and the decision to terminate was upheld. And that
2 entity was an independent third party. And then there was a
3 complaint filed and the decision to terminate was still
4 upheld.

5 So to suggest that this is retaliation by Keith
6 Jones or anyone else simply falls apart because there are so
7 many layers to the review process.

8 Mr. Sanders wants you to believe in this case that
9 he was terminated because he reported track defects.
10 There's no credible evidence to support that. His job is to
11 report track defects. He worked that job from 2010 until he
12 was terminated. He reported hundreds of track defects. He
13 took tracks out of service a lot of times. He placed slow
14 orders hundreds of times. It's his job ensure the safe
15 passage of trains.

16 And here's why BNSF wants to make sure those
17 tracks are safe: Because if they're not, there could be a
18 derailment which results in substantial property damage,
19 injury to person, and that disrupts trains, and that affects
20 velocity. So they want to get it right. They want the
21 proper defects reported. His job was to identify the
22 defect, protect the track, whether that meant slowing down
23 the train or taking the tracks out of service.

24 You'll hear from Keith Jones and Steven Chartier
25 about the importance of reporting defects. You'll also hear

1 from Justin Hughes out of Fort Worth. He'll tell you about
2 BNSF's investment in ensuring that tracks are properly
3 inspected.

4 BNSF has what's called geometry cars. And these
5 are cars, inspection cars, that are pulled by train across
6 the track specifically to find track defects. Again,
7 they're trying to make sure that there aren't derailments.
8 So it makes no sense to suggest that Mr. Sanders shouldn't
9 report track defects because a geometry car could find it if
10 he didn't.

11 And there's another level of check on these track
12 inspectors and that is FRA, the Federal Railroad
13 Administration. They've got their own track inspectors.
14 They inspect BNSF tracks. If they find a defect, they write
15 it up. So there's no way BNSF could discourage track
16 inspectors from properly reporting track defects. The
17 evidence simply isn't there to substantiate this.

18 Now, there was reference made in opening about
19 incentive not to report. And there'll be talk about
20 scorecards or dashboards and the importance of keeping
21 defects down and slow orders down. It's simply not the
22 case.

23 You'll hear about scorecards as being a dashboard.
24 One witness will describe it as a one-stop document for
25 managers and directors to see how their territory is doing.

1 You might have a territory that's had floods and those
2 tracks are going to be in sad shape, and they need to find
3 the capital to put in that territory. It's not unlike any
4 other business that measures efficiency and productivity.

5 You'll hear about ICP bonus. Yes, BNSF managers
6 are paid a salary, and they're paid a bonus depending on how
7 the company does. And the company does better if they don't
8 have derailments and damage to property and person.

9 You heard discussion in opening about the
10 reporting to HR, and Mr. Sanders feeling like he was
11 retaliated. He did report to HR. And you'll hear from the
12 people at HR about what their investigations were and his
13 complaints.

14 And you'll hear that Keith Jones actually received
15 a coaching and counseling letter. You'll hear some
16 recordings. And there is profanity used. And BNSF said
17 that's not appropriate. You can't do that.

18 And, interestingly enough, in an effort to save
19 his job after the first investigation, Mr. Sanders made
20 another complaint, hotline complaint, again reiterating the
21 complaints he'd made months earlier. And those complaints
22 were investigated and not substantiated.

23 At the end of this case, we'll come before you and
24 ask you to make the only decision that makes sense based on
25 this evidence, and that is that Mr. Sanders was terminated

1 for time theft. He falsified his payroll on three
2 occasions.

3 Thank you.

4 THE COURT: Mr. Kaster, is Mr. Sanders prepared to
5 call his first witness?

6 MR. LUCAS KASTER: Yes, Your Honor. Mr. Sanders
7 calls -- sorry -- Mr. Keith Jones for adverse examination.

8 THE COURT: Mr. Kaster, I understand we're going
9 to take just a five-minute break to set this up.

10 Members of the jury, we're going to set up the
11 video conference at this time. We will take a very short
12 break to allow us to do that and continue when that's done.
13 So that'll be a break of about five minutes, I guess.

14 All right. We'll adjourn.

15 THE LAW CLERK: All rise.

16 (Recess taken at 3:41 p.m.)

17 * * * *

18 (3:50 p.m.)

19 IN OPEN COURT

20 THE COURT: All right. Please be seated.

21 We'll begin by administering the oath.

22 THE COURTROOM DEPUTY: Please state your full name
23 for the record, spelling your first and last name.

24 THE WITNESS: Keith, K-E-I-T-H, David, Jones,
25 J-O-N-E-S.

1 THE COURTROOM DEPUTY: Please raise your right
2 hand.

3 **KEITH D. JONES, PLAINTIFF'S WITNESS, SWORN**

4 THE WITNESS: I do.

5 THE COURTROOM DEPUTY: Thank you.

6 THE COURT: Mr. Kaster.

7 MR. LUCAS KASTER: Thank you, Your Honor.

8
9 **CROSS-EXAMINATION**

10 **By MR. LUCAS KASTER:**

11 Q. Good afternoon, Mr. Jones. My name is Lucas Kaster.

12 I'm one of the attorneys who's representing Mr. Sanders.

13 Obviously, we are all remote. So if at any time I
14 break up, you can't hear me or understand me, just let me
15 know that. Okay?

16 A. Okay, and same for me as well.

17 Q. Will do.

18 Mr. Jones, you were hired by BNSF in 1992, is that
19 right?

20 A. That is correct.

21 Q. And during your career you've held multiple different
22 positions, right?

23 A. That is correct. That is correct.

24 Q. You started in a maintenance crew?

25 A. Yeah. I started on as a trackman laborer back in June

1 of '92. Yes.

2 Q. And that's a scheduled position, right?

3 A. That is correct.

4 Q. What does that mean, to be a scheduled position?

5 A. Scheduled means you're actually doing the work. So
6 you're in the union. As you hire on, you've got a 60-day
7 trial period that you do the work. They observe you, make
8 sure you can handle -- make you have the work -- the right
9 work ethic for BNSF, that you can handle -- the skills, you
10 can withstand the elements that we work in, the hours that
11 we work, and just see. And after 60 days you start paying
12 union dues. So you're protected by the bargaining
13 agreement. And then you just kind -- at that point you
14 start your seniority. And you just work your way up on
15 different positions, different things like that, based off
16 your skill set and what your ambitions are for BNSF.

17 Q. You also served as an assistant roadmaster?

18 A. That is correct.

19 Q. And then you became a roadmaster?

20 A. Yes.

21 Q. And then you were the manager of roadway planning in the
22 Southwest Division, right?

23 A. Yes, sir.

24 Q. And then you became a division engineer?

25 A. That is correct.

1 Q. And you became a division engineer in 2013?

2 A. Yes.

3 Q. At what point -- because a division engineer is a
4 nonunion position, right?

5 A. Yeah. All the positions you named from assistant
6 roadmaster up were all nonunion. They were all exempt is
7 what we call them.

8 Q. Okay. And you became a division engineer in the Twin
9 Cities East Division, is that right?

10 A. That is correct.

11 Q. And what's the geographic area the Twin Cities East
12 encompasses?

13 A. It has portions of Superior up into the Duluth area,
14 goes across kind of the northern part of the state, across
15 what's called the lakes: Casco, Grand Forks subdivision
16 over to a little town -- a little place called Benoit. I
17 have the Staples sub that goes across -- kind of angles
18 across the state of Minnesota. Frazee is as far west as I
19 go. So that's geographically -- or mile post 200 on the
20 Staples sub. And it goes all the way into Northtown, which
21 is in Minneapolis. As far south as I go towards Chicago is
22 Hastings. Down towards the south, you know, that's part of
23 the St. Paul. And then I've got a little bit of the Wayzata
24 out towards the actual -- the town of Wayzata. And then
25 I've got all the tracks in the middle of that. Hinckley sub

1 that comes out of Minnesota -- or out of Twin
2 Cities/Minneapolis, and it goes up to Duluth and Superior
3 area. So I have about 1,350 miles of track in that square
4 area that I kind of named.

5 Q. And there's a division engineer that is over the Twin
6 Cities West Division as well, right?

7 A. That is correct.

8 Q. And I'm assuming that person has a separate geographic
9 area?

10 A. Yep. He picks up where I stop at Benoit. He goes
11 farther west, and then he takes it -- Frazee, same deal. He
12 goes farther west from there.

13 Q. And there are only two division engineers in the Twin
14 Cities Division?

15 A. No, sir. There's a Twin Cities South as well.

16 Q. How would you describe your duties and responsibilities
17 as a division engineer?

18 A. Very challenging. Very important. A lot of moving
19 parts. A lot of people to manage, you know, from the
20 schedule to the -- my direct reports, which I refer to them
21 as either FLS or frontline supervisors, roadmasters. And
22 then I bring on new assistant roadmasters that work for me.
23 SES, which is a supervisor engineering support that does a
24 lot of work to support the FLS, the assistant roadmasters,
25 and the scheduled ranks as well.

1 So it's very challenging, and there's a lot of
2 moving parts, and there's a lot of changes. You need to
3 understand the state policies, the federal policies, our
4 BNSF policies that change. Make sure the training is going
5 off. Make sure everybody understands. Make sure
6 everybody's working safe. Observe people on their
7 day-to-day travels, on their day-to-day work activities.
8 And then just, you know, spend the time with them in the
9 field. And then make sure that my supervisor teams are
10 training appropriately, having the right monthly safety
11 meetings. Making sure they're taking care of their
12 territories. Making sure they're getting their capital
13 plans, meaning the forecasted plans for the next few years.
14 Making sure they're getting the right data captured. That
15 way we can get upcoming rail relays, upcoming tie plans,
16 turnout replacements, all kinds of stuff. They have to make
17 sure they're getting the right data put in and forecasting
18 ahead so we can stay ahead of the changes in the railroad --
19 you know, just how the things wear out over time.

20 Q. You referenced FLS or frontline supervisors. Those are
21 roadmasters, right?

22 A. That is correct.

23 Q. And roadmasters are your direct subordinates?

24 A. That is correct.

25 Q. And then you mentioned assistant roadmasters, who I'm

1 assuming are directly underneath roadmasters?

2 A. Yeah. It's kind of like an apprenticeship job. So they
3 come in and then they fill in. If a roadmaster has a lot of
4 work on their territory, they'll go help and assist or if
5 they're on vacation or something like that.

6 So they're just kind of developing for to the next
7 -- like if a roadmaster promotes up to the next position,
8 typically your FO -- or you're assistant roadmaster is
9 trained, ready to maybe fill that gap if he or she is
10 interested in that location.

11 Q. And track inspectors would be supervised by roadmasters
12 or assistant roadmasters, right?

13 A. That is correct.

14 Q. So you would be the second level up from an inspector,
15 assuming there's no assistant roadmaster?

16 A. That is correct for the most part, yes.

17 Q. As a division engineer, do you monitor the hours the
18 employees under your direction are working, including their
19 overtime?

20 A. Yeah, to a point. I mean, we've got programs that we
21 run to see if overtime is high. You know, it drills down to
22 people that show to be maybe having higher overtime or maybe
23 put in if they're out on a project or working a derailment
24 or work something like that you just kind of supervise.

25 So I have access to all the hours, if needed,

1 something that maybe seemed a little bit high or a little
2 bit excessive as opposed to the other locations or other
3 positions like that.

4 Q. And you generally review hours for your subordinates on
5 a weekly basis, right?

6 A. Yeah. It varies. It depends on how many moving parts.
7 A lot of times our busy season is -- obviously, once the
8 snow falls, the ground thaws and we're doing a lot of work.
9 So I'm look at the capital spend rates, making sure that
10 they're charged to appropriately, just making sure that
11 they're even charging to them because we get different
12 buckets of money for each project based not just off of our
13 operating allocations. We get what's called AFEs or capital
14 authorities for expenditure. So those have to be kind of
15 tracked and make sure that everything is reported
16 accurately.

17 Q. Mr. Jones, I asked you before we started if you had a
18 copy of your deposition transcript. Could you pull that out
19 for me.

20 A. Yes.

21 Q. And just turn to page 105.

22 A. (Complies.) I only go up to page 50 -- oh, sorry. It's
23 the little bullet point. Okay. Hold on. I was looking at
24 the top numbers at the top here. Okay.

25 Q. And do you see on line 14 you were asked this question:

1 "Q. Okay. Do you monitor the employees under
2 your direction, like their hours and how often they're
3 working and overtime?"

4 Your answer: "Yeah, high level. I mean, I --
5 like I said, reports of, you know, individuals putting in,
6 you know, high levels of overtime."

7 "Q. How often do you check that, would you say?"

8 Your answer was: "Maybe on a weekly basis one day
9 out of the week."

10 That was your answer in your deposition, right?

11 A. Yeah, that's what it shows here. Yes.

12 Q. Now, as a division engineer you have a direct boss as
13 well, right?

14 A. That is correct.

15 Q. And that boss is a general director?

16 A. Yes.

17 Q. And there's one general director for the Twin Cities
18 division?

19 A. That is correct.

20 Q. And back in 2015, that general director was Doug Jensen,
21 right?

22 A. That is correct.

23 Q. And then after Mr. Jensen it was Robert Rindy?

24 A. That is correct.

25 Q. And what's the job title of the general director's boss?

1 A. The general director's boss?

2 Q. Correct.

3 A. That's the North Lines AVP. He just has a team of --
4 well, we're talking six years of changes here. So we've
5 done away with some of the operating locations.

6 So I believe, you know, just high level, he
7 oversees the -- you know, just how the divisions are running
8 based off the GDM's roles and responsibilities. That means
9 that they're training the signal managers, DEs, structures
10 managers at the time. So he just oversees that we're doing
11 that training, setting expectations, things of that nature,
12 you know.

13 And then the AVP would be just double-checking
14 that -- the history or how well the territories are running
15 based off of safety and derailments.

16 Q. You said before -- you said GDM. I'm assuming that's
17 the general director of line maintenance?

18 A. GDLM, yes.

19 Q. Okay. And that's Mr. Jensen and Mr. Rindy?

20 A. That's correct.

21 Q. And above them was the AVP. Back in 2015, that was Dave
22 Hesterman, right?

23 A. That is correct.

24 Q. And in 2015 in the Twin Cities East Division, there was
25 a time when there was no roadmaster under your direction, is

1 that right?

2 A. No roadmaster -- say that again.

3 Q. Sure. Back in 2015, while you were a division engineer,
4 in the Twin Cities East Division, was there a time without a
5 roadmaster?

6 A. Back then I had six of them. So I don't know what
7 particular you're asking. There might've been a brief stint
8 at one of the places that may have promoted or done
9 something that I was in process of hiring new. But I
10 wouldn't have been without any roadmasters, if that's what
11 you're asking.

12 Q. Okay. And I should've been more specific. I appreciate
13 that.

14 In Dayton's Bluff, St. Paul, was there a period
15 when there was no roadmaster?

16 A. Yeah. As I said, it's a blur from the timeline of all
17 of this, lot of moving parts. There was a time when William
18 Schumake was the roadmaster there when I first arrived on
19 the position. I can't remember when he promoted out and
20 when Blaine actually come in. There could've been a portion
21 of time whenever there was waiting for the approvals and
22 maybe her to finish up on her gang stuff or something like
23 that to come in.

24 Q. And you referenced "Blaine." Is that Blaine Hoppenrath?

25 A. That is correct.

1 Q. And when she became the roadmaster in Dayton's Bluff,
2 was that the first time that she was a roadmaster?

3 A. Yes. She was an assistant roadmaster on the capital
4 gang, one of the big production tie gangs. But this would
5 be her first territory roadmaster job.

6 Q. Now I want to switch gears a little bit and talk about
7 track inspectors. Track inspectors are a federally-mandated
8 position, right?

9 A. Well, the -- not the inspector job is federally
10 mandated, just making sure that we meet the timelines and
11 the requirements of inspecting track. We can do that with
12 whatever position that is qualified to do that under the FRA
13 training and stuff like that. So we can use foremans. We
14 can do whatever. But BNSF, you know, has the positions out
15 there that are track inspectors that primarily do our
16 inspections.

17 Q. And whoever is doing those track inspections have to be
18 qualified under the federal regulations, right?

19 A. That is correct.

20 Q. And in Dayton's Bluff back in 2015, there were three
21 types of track inspectors. There was a main line inspector,
22 there was a yard inspector, and then there was a thing
23 called a relief inspector, is that right?

24 A. That's correct.

25 Q. And a main line inspector's primary responsibility is to

1 ride along and inspect what are called the main line tracks?

2 A. That is correct.

3 Q. And the main line tracks are where all the traveling
4 trains travel along to get from, for example, Minneapolis to
5 Chicago?

6 A. Yeah. Typically, the main line are a little bit higher
7 speed and they're not doing any yard switching or anything
8 like that. They're just kind of a through route, the main
9 thoroughfare.

10 Q. And then the yard inspections are actually the locations
11 where the trains are loaded up and that the trains are
12 connected to each other and then taken out onto the main
13 line, is that right?

14 A. That is correct.

15 Q. And that's what we all would consider when we drive by
16 something and there's all of these train cars lined up kind
17 of sitting there still? That would generally be considered
18 a yard?

19 A. Yeah. That or a siding or something like that, yes,
20 secondary.

21 Q. And then what's the relief inspector?

22 A. So back in this time when we had those out there, we
23 were -- with all of the oil traffic and things that was
24 running we just had -- you know, it was -- a lot of times
25 for a person to run seven days a week and things like that.

1 So they come in. They would run the days off from the
2 normal main line inspector. They just had the offset days.

3 So if an inspector would run through Monday
4 through Friday or let's say Tuesday through Saturday, the
5 other one would run Monday through Friday or however the
6 days intersected there.

7 Q. And the job responsibilities of a track inspector are to
8 inspect the track for defects, to protect the track, and
9 then enter any slow orders that may be necessary?

10 A. That is correct.

11 Q. If we could pull up Exhibit 225.

12 A. Do I have to look at these at the same time? If I can
13 see them on the screen.

14 Q. If you can see them on the screen, that's all you need.
15 I'll direct you to right where we need to look. So that
16 might be easier for you.

17 If we can go to page 3 of this exhibit, please,
18 and blow up the very top section, 2.1.

19 Mr. Jones, this is part of something called the
20 Engineering Instructions. What are the Engineering
21 Instructions?

22 A. It's a higher level of instructions that BNSF puts out.
23 You know, we talked earlier about the FRA mandates and the
24 guidelines. They're kind of a minimal standard. So BNSF
25 will mirror some of those, but sometimes we have higher

1 standards.

2 So we have engineering instructions that we put
3 out there that gives direction on whatever. Like this
4 Section 2 is basically for track inspection purposes. It's
5 a guideline for inspectors to follow. Section 4 may be over
6 temporary restrictions. And Section 6 is over the rail. So
7 it's just a big process manual for people to look at and
8 follow.

9 Q. So this is BNSF's book regarding track inspections,
10 their rules and regulations?

11 A. That is correct.

12 Q. And this lays out the purpose for track inspectors like
13 Mr. Sanders?

14 A. That is correct.

15 Q. If we can take Exhibit 225 down. And if we can pull up
16 Exhibit 13 and go to page 80, please.

17 While we're doing that, Mr. Jones, I'll ask you a
18 question. So we saw the EI book or engineering instruction
19 book. That's BNSF's rules. You also reference that there
20 are FRA rules as well?

21 A. That is correct.

22 Q. And does the FRA have a separate book that lays out
23 their track inspecting rules and regulations?

24 A. They do, yes.

25 Q. And what is that?

1 A. It's just the FRA book, like 213. It's got different
2 sub parts, but it primarily covers the 213.9 segment of the
3 FRA, which is the track safety standards.

4 Q. And I'm going to hold up a book because I think you can
5 see me. Does this look like a small book of the federal
6 regulations?

7 A. That is correct.

8 Q. This lays out all the regulations that Federal Railway
9 Administration puts out regarding track inspections, right?

10 A. Yes.

11 Q. It indicates how often tracks need to be inspected?

12 A. Yes, to a minimum when they have higher standards for
13 BNSF. But, yes, that's the minimum amount that they would
14 require.

15 Q. And as a track inspector are you required to fix the
16 actual defects?

17 A. Yes, to an extent there's minimal repairs. For
18 instance, like if they're out and there's a cotter key
19 that's missing out of the bolt, they can do that. Knock a
20 wedge plate on. They do carry tools.

21 We would never expect them to try to change out
22 ties or fix broken rails, but minor repairs that they would
23 document.

24 You would still want them to report the defect but
25 then make the repair and show it repaired before track or

1 whatever. But they do make minor repairs, yes.

2 Q. Because BNSF has separate entire crews that are
3 dedicated to actually doing the substantial repairs, right?

4 A. Yes.

5 Q. So if we look at what's on the screen now, Mr. Jones,
6 this is a page within that federal regulations manual. And
7 under Section A of 213.233 about track inspections, it
8 references that all tracks shall be inspected in accordance
9 with the schedule prescribed within this section by a person
10 designated under 213.7.

11 Do you see that?

12 A. Yes, sir.

13 Q. Is that what you're referring to when somebody needs to
14 be qualified to track inspect?

15 A. That is correct.

16 Q. So it's designated under 213.7 as being qualified to
17 track inspect?

18 A. That is correct.

19 Q. Because not anybody on the railroad is qualified to go
20 out and inspect track, is that fair?

21 A. Correct. Yeah, not everybody.

22 Q. And as a track inspector, you're typically inspecting
23 that track by yourself?

24 A. I think when I was there in the beginning, I think
25 Mr. Heyer and Don Sanders would ride a lot together. But,

1 yes, over time with the Northern Lines Agreement it was
2 typically just one track inspector was allowed to.

3 We used to have track -- used to be called track
4 maintainers and track inspectors. They would ride together.

5 Q. Are track inspectors required to follow all the rules
6 and regulations within the federal regulations book that we
7 just looked at?

8 A. That is correct.

9 Q. Are they required to follow all the rules and
10 regulations within BNSF's engineering instructions?

11 A. That is correct. To the best of their ability, yes.

12 Q. By the way, how big is the engineering instructions?

13 A. It's big. I wouldn't know how many pages. We've
14 amended stuff and added stuff. It's several -- I think it's
15 20-some sections based off of the reporting system to
16 welding. Yeah, it's pretty big.

17 Q. Does it look kind of like this (indicating)?

18 A. Yes.

19 Q. In addition to actually inspecting the track, are track
20 inspectors required to do other things like pilot crews?

21 A. Yes, to a minimum. We try to work hand in hand. If the
22 inspectors are caught up, are within frequency, if we have a
23 test truck or something like that we feel like they have the
24 ability -- if they feel like, hey, I'm behind on my
25 timelines, this may put me in a cramp or I may have to work

1 weekends and work overtime, then we just make it a mutual
2 agreement with the FLS and them working out their day-to-day
3 routines that if they have the time, they can and take rail
4 detectors, geo trucks, things like that across. But if
5 they're not staying caught up or they feel like it may press
6 them a little bit, then usually find somebody else to pilot
7 them.

8 Q. What does it mean to "pilot" a crew?

9 A. So before you get set on the track you have to get time
10 from point A through B through the dispatching center down
11 in Fort Worth so they know where the traffic is, as far as
12 where the trains are at.

13 You will get positive protection, meaning you own
14 that piece of track. If you sit on either a ride with,
15 let's say, a rail detector that's scanning our rail for rail
16 defects, you'll either get in and ride with them or you'll
17 sit on of one of our high-road vehicles and then set their
18 truck on and they just follow along knowing that we have
19 property protected. And they can't go out of the limits
20 that we have for that piece.

21 Q. You said a couple things now that I want to just flesh
22 out. You've referenced "tracking time." What is that?

23 A. Just what it is. There's different authorities of track
24 based off of locations. But tracking time is primarily what
25 was down in the St. Paul area. So that's what we call it.

1 It's whenever you call the dispatcher or you get on the
2 computer and you request time, it's called tracking time.

3 And that gives you authority. When they grant
4 that and give you -- you go through a procedure of getting
5 it, sign off on it, repeating it back, and then they okay
6 it. At that point you own that piece of track from, let's
7 say, point A to point B and no trains can run on that
8 segment of track when you have tracking time out there.

9 Q. It's kind of like air traffic control?

10 A. Yeah, kinda.

11 Q. Just to make sure if a crew is on a section of track
12 doing repairs that a train doesn't come by and hit them?

13 A. That is correct.

14 Q. Do track inspectors at times also have to serve as
15 foremen for crews if a foreperson doesn't show up?

16 A. There again, I mean, it's a rarity. If an inspector is
17 like, hey, I've got time to come over here, I'll show them
18 what to do, what I'm seeing, whether this defect -- I want
19 this part gauged from here to here because, you know, things
20 are kind subject based off what people see: where they mark
21 it at, where the exact location is, because there's no
22 perfect way to mark anything.

23 So they will maybe go and spend some time with a
24 section crew and say, hey, this is what I'm doing, if you
25 can just gauge this in a little bit or change these plates

1 out or change these broken spikes or whatever the details
2 are. They could go by and assist them.

3 And, like I said, if they're caught up on their
4 inspections, they could stay there and work with them all
5 day. But if they had work to go do and inspections to do or
6 tracks to walk, typically they just kind of get them set up
7 and go through what they're seeing and what they want, like
8 to see fixed. And then they go off and finish their main
9 track inspection.

10 Q. I want to go back to Exhibit 13, Mr. Jones, and look
11 back at this -- now look at Section B. Can you read that
12 okay in front of you? Maybe we can blow that Section B up a
13 little bit.

14 A. Yup.

15 Q. Thank you.

16 A. That's too much. Let's see. Can you slide to -- I can
17 read it right there.

18 Q. Okay. We'll just be --

19 A. Do you want me do parts 1 and 2 or just B only?

20 Q. No, I don't need you to read it. I just want to ask you
21 a couple questions about a specific section.

22 A. Okay.

23 Q. So it says here that each inspection shall be made on
24 foot or by riding over the track in a vehicle, right?

25 A. Yes.

1 Q. And if the track inspector is inspecting in a vehicle,
2 according to this provision, they can't go more than five
3 miles an hour while they're track inspecting, right?

4 A. That's just over -- it says five miles an hour while
5 passing over track crossings and turnouts; otherwise, the
6 inspection vehicle shall be at the sole direction of the
7 inspector.

8 So that's just certain locations that they have to
9 do it at five miles an hour, not all tracks. So a track
10 crossing would be like a diamond. So these have two
11 different directions of route. So you may have a foreign
12 railroad that has -- that goes one way and we go another.
13 So it's like a cross over the track. So that's called a
14 track crossing.

15 And you want to go slow over that because our high
16 rear wheels will drop down in the slots, and sometimes it
17 can climb one side of it or it just hits it really hard. So
18 those areas you want to go slow for that purpose. And then
19 there's a lot of binding bolts and rails and stuff like
20 that, so you want to go slower over those locations. That
21 way you can inspect it a little bit more thorough.

22 Q. According to this section of the federal regulations, if
23 a track inspector is inspecting tracks from a vehicle, the
24 speed at which they do that inspection is at their sole
25 discretion, is that right?

1 A. Yes.

2 Q. If we can go to page 82 of this same exhibit.

3 Mr. Jones, do you see this chart?

4 A. Yes.

5 Q. And this is the chart that, according to the federal
6 regulation, lays out how often sections of track need to be
7 inspected, right?

8 A. That is correct.

9 Q. And so you just kind of follow this chart, right? Top,
10 left-hand corner, accepted track and class 1, 2, and 3
11 track. If it's a main line track or a siding, it needs to
12 be inspected weekly with at least three calendar days in a
13 row between inspections or before use, right?

14 A. That is correct.

15 Q. Going down on that kind of the first row but the third
16 column under "Required Frequency," it then says "or twice
17 weekly with at least one calendar day interval between
18 inspections if the track carries passenger trains with more
19 than 10 million gross tons of traffic during the preceding
20 calendar year." Do you see that?

21 A. Yes.

22 Q. So the more traffic that goes over a track, the more
23 frequently it needs to be inspected?

24 A. Yes.

25 Q. We were talking about yard versus main line. Is yard

1 considered accepted track or does it fall under one of these
2 different categories?

3 A. You can have both. It depends on what the usage is and
4 what we deem it as.

5 Q. And then we see under the second row there's a second
6 classification other than main track and sidings. Those
7 need to be inspected monthly with at least a
8 20-calendar-days interval between inspections, right?

9 A. Correct.

10 Q. What happens if that timing of those inspections is not
11 met according to the federal regulations?

12 A. I believe remove them from service if you don't meet the
13 frequency or slow them down a class of track.

14 Q. You can't just leave it as is, right?

15 A. Correct.

16 Q. When track inspectors find a defect, what are they
17 supposed to do?

18 A. Like I said, definitely the most important thing is to
19 report the defects. And that just gives us a running tally
20 of kind of what we've got going on. But, you know, then if
21 they repair it, they just close it out showing repaired
22 before traffic once they report it.

23 Q. And you've referenced reporting it. Where do they
24 report it?

25 A. Well, things have changed. If we're talking about back

1 then, it would have been -- I don't know if -- either CORS
2 (ph) or TIMS back in this timeline.

3 Q. What are those programs?

4 A. TIMS is a track inspection maintenance system, I think,
5 is what it stood for. It's just a reporting tool for them
6 to report where they was at, what asset they were inspecting
7 or what click number on track segment, and what they seen,
8 and what they measured or noted for that inspection.

9 Q. If we can go to -- let me back up before I go there.

10 You referenced TIMS. That's a BNSF program, is
11 that right?

12 A. That is correct.

13 Q. So if a track inspector finds a defect, they have to
14 report it into TIMS?

15 A. That is correct.

16 Q. And BNSF is required per the federal regulations to keep
17 those records, right?

18 A. That is correct.

19 Q. Back in 2015, did track inspectors like Mr. Sanders also
20 have to detail the defects that they found in nightly
21 reports?

22 A. It wasn't a detail. It was high level. From what I had
23 seen -- you know, I would get a few of these nightly
24 reports, but it wasn't something that they had to type out
25 every little thing that they did. It was mainly for

1 higher-level concerns, like we're starting to see a mud spot
2 here or this curve is starting to get a little bit wide,
3 something like that, that we really needed to get attention
4 on. Not so much the small I found a bolt out here or a
5 loose wedge here or a missing clip. Those weren't supposed
6 to be detailed.

7 Q. Is there a BNSF policy that required nightly reports?

8 A. No. It was a supervisor expectation.

9 Q. And what was the purpose of that expectation?

10 A. To work together and partner together so we could make
11 sure the crews were being allocated in the right spots, we
12 were getting the right details put together.

13 You know, things changed dramatically out on the
14 railroad, so if we had a plan put together this week and
15 just to go out and take care of this and something majorly
16 changed that caused a bigger problem -- you know, if the
17 track inspector said, "Hey, I'm really concerned. It was
18 good a couple weeks ago, but now I'm seeing a little
19 movement. I'd like to do this."

20 A lot of times track inspectors worked hand in
21 hand with the FLS, the roadmasters. And they could divert
22 the priority if they seen something changing at a high rate.

23 Q. And if a track inspector refused to report something
24 that was an actual defect, they could be subjected to a
25 fine, is that right?

1 A. That is correct.

2 Q. If we could go to page 106 of Exhibit 13.

3 In this federal regulations book is a list of what
4 the violation fines could be if a defect is not reported,
5 right?

6 A. That is correct.

7 Q. Is there ever a time a track inspector should not report
8 a defect?

9 A. No. No. If they find it, it should be reported no
10 matter how minimal it is.

11 Q. And that's required by FRA standards?

12 A. Yes, and BNSF.

13 Q. And BNSF engineering instructions?

14 A. Correct.

15 Q. What's a slow order, Mr. Jones?

16 A. So it's kind of like a temporary -- what it is from
17 point A to point b. So if trains can run at a -- let's say
18 from mile post 10 to mile post 20, the normal track speed
19 is, let's say, 40. And if an inspector goes out there and
20 finds what's called a dip -- so a dip is where both rails --
21 we want them kind of like on tangent track where you're
22 running smooth. In a perfect world you want both rails the
23 same height. If you start getting a mud spot or something
24 happens there -- a ballast washes out or whatever -- you'll
25 get one rail that will -- or both rails that will dip down.

1 Based on how far that dips down, that's what you
2 need to slow it down. So let's say class four -- it's all
3 determined by speed. At 40 miles an hour or 60, if it dips
4 down, let's say, over two inches, it may only be good for
5 class two. So you would put a slower for a tenth of a mile
6 or whatever the inspector deemed necessary for a small
7 portion of that railroad. They would slow the traffic down
8 to like the lower class of track, a lower speed.

9 Q. And that slow order is intended to keep everybody safe?

10 A. Absolutely. Yes.

11 Q. Keep the trains from derailling?

12 A. Yes.

13 Q. If we could go to page 76 of Exhibit 13.

14 And while we're doing that, Mr. Jones, when a
15 defect requires a slow order, that's also something that is
16 laid out in the federal regulations as well, right?

17 A. Yes. It gives the -- kind of the measurements and
18 standards for the type of defect identified and what would
19 be required for speed-wise.

20 Q. So we see on this page at the bottom of the page,
21 Mr. Jones, there's a Section 213.137 and the heading is
22 "Frogs." Do you see that?

23 A. Yes.

24 Q. What is a "frog"?

25 A. Okay. We've got a lot of jargon. So a frog --

1 actually, it's a component on a turnout. So what a turnout
2 does is it -- you've got to have ways for trains to bypass
3 each other. So a turnout -- or a switch is the same thing.

4 It allows the dispatcher or throw it by hand a
5 train to divert its direction across a turnout, which in
6 turn runs over a frog, because that's the main component of
7 the turnout that lets the wheels stay straight down the
8 turnout, or when you throw the point section, it will run
9 over the frog to the diverging route and goes into either
10 the other main line, or the siding, or a yard track.

11 So a frog literally looks like maybe somebody run
12 over a frog on the highway and it just kind of squashes its
13 arms and its legs out. That's kind of why we call them
14 "frogs." It's kind of split with channels, if you will,
15 flangeways that allow the trains to go straight or through
16 the diverging route.

17 Q. I've seen it -- or heard it depicted as, basically, a
18 big X. It's the big metal piece in tracks that are going in
19 opposite directions. Is that right?

20 A. Yeah. That's pretty fair to say. Yes.

21 Q. Under this section there are certain measurements as to
22 how a track should be measured, right?

23 A. The frog itself, yes.

24 Q. Okay. And under Section B it says: "If a frog point is
25 chipped, broken or worn more than five-eighths inch down and

1 six inches back, operating speed over the frog shall not be
2 more than ten miles per hour," right?

3 A. That is correct.

4 Q. And that's an example of the federally-mandated slow
5 order that we were just talking about?

6 A. Yes. One of many, yes.

7 Q. And so if that measurement is there, track inspectors
8 don't have any discretion as to whether they can enter a
9 slow order, right?

10 A. If it meets those standards, yes, it needs to be slowed to
11 a ten.

12 Q. And we see another version under Section C of when slow
13 orders should be entered for a frog, right?

14 A. Yes.

15 Q. And, like you said, there are many other times when slow
16 orders are required by the federal regulations as well,
17 right?

18 A. That is correct.

19 Q. Is there ever a time when a track inspector should not
20 enter a slow order?

21 A. Not if the conditions meet that, no. No.

22 Q. Is there ever a time when a track inspector should delay
23 reporting a defect or a slow order?

24 A. You can delay putting the defect in. That's not
25 instrumental. A lot of times they would put their defects

1 in at the end of the day. They would just document.

2 The slow order needs to be done immediately if
3 they find that condition that the track needs to be slowed
4 down or doesn't meet the higher speed class of track. It
5 needs to be put on before the next train goes over that
6 condition.

7 Q. But track inspectors are supposed to report defects and
8 slow orders as soon as they possibly can, right?

9 A. Slow orders immediately, defects when they get back to
10 do their reporting.

11 Q. During Mr. Sanders' employment as a track inspector, did
12 you ever attempt to persuade him to not report a defect?

13 A. No.

14 Q. Did you ever attempt to persuade him to delay reporting
15 a slow order?

16 A. No.

17 Q. In your employment with BNSF, have you ever encouraged
18 any employee in any way to not document something that is a
19 defect?

20 A. No.

21 Q. Have you ever encouraged an employee in any way to delay
22 reporting a defect?

23 A. No.

24 Q. Mr. Jones, are you familiar with BNSF's EEO policy?

25 A. Not 100 percent, no.

1 Q. If we could pull up Exhibit 23.

2 Mr. Jones, this is BNSF's Corporate Equal
3 Employment Opportunity, Anti-Discrimination, and Harassment
4 Policy.

5 Do you see that?

6 A. Yes.

7 Q. Have you seen this before?

8 A. Yes.

9 Q. Under Policy Requirements, point A: "BNSF Railway
10 employees must treat others with dignity and respect."

11 Do you see that?

12 A. Yes.

13 Q. Under C: "Any form of discrimination or harassment of a
14 person, including sexual harassment by or towards any BNSF
15 railway employee, contractors, suppliers or customers is
16 prohibited," right?

17 A. Yes.

18 Q. And the last bullet point says -- or all of the bullet
19 points are examples of that type of harassment or
20 discrimination that is prohibited under BNSF's policy,
21 right?

22 A. That is correct.

23 Q. And the last bullet point reads: "Any other verbal or
24 physical conduct that harasses, disrupts or interferes with
25 another's work environment or that creates an intimidating,

1 offensive or hostile work environment."

2 Do you see that?

3 A. That is correct.

4 Q. That's BNSF's written policy, right?

5 A. Yes.

6 Q. Let's talk about Mr. Sanders' employment under your
7 direction. He was under your direction as a track inspector
8 in Dayton's Bluff -- or I should say in the Twin Cities
9 Division between 2013 and 2016, right?

10 A. That is correct.

11 Q. And during that time, Mr. Sanders had different bosses
12 as roadmasters. You referenced Bill Schumake before?

13 A. That is correct.

14 Q. Are you aware that he had Luke Babler and Dale Johnson
15 as roadmasters prior to Mr. Schumake?

16 A. Yeah. They were on those positions prior to me, so yes,
17 I was aware.

18 Q. And then Ms. Hoppenrath in 2015?

19 A. Correct.

20 Q. And you viewed Mr. Sanders as a track inspector as very
21 reliable, right?

22 A. Yes.

23 Q. He was willing to work overtime?

24 A. That is correct.

25 Q. When he was called, he came in?

1 A. Yes.

2 Q. And that was a problem sometimes? If you needed sort of
3 last-second help, sometimes employees wouldn't show up if
4 they weren't scheduled, right?

5 A. Yeah, there was times, depending on if it was holiday
6 timeline, weather was bad. Some people come in and do their
7 job and that's kind of all they were interested in.

8 Q. Mr. Sanders was willing to come in late at night?

9 A. Yes.

10 Q. He was willing to fill -- sorry. Go ahead.

11 A. No, I'm sorry. I was just coughing.

12 Q. He was willing to fill in when other people didn't show
13 up?

14 A. That is correct.

15 Q. And he had a passion to do the job that he was assigned
16 the best that he could?

17 A. Yes.

18 Q. That was your view of him?

19 A. Yes.

20 Q. Have you ever heard of something called a track
21 inspector evaluation?

22 A. Yes.

23 Q. And what is that?

24 A. They were - the FLS, the roadmasters are required kind
25 of on a monthly basis based on how many miles of track, how

1 many inspectors they have, to go out and hi-rail with them
2 and just kind of do -- it's like 13 core competencies, like
3 running a level board, which is one of the tools that we use
4 to check like the dip earlier I was talking about or a
5 string line to check the points of a curve, if it's got a
6 flat spot or something like that.

7 So you go out and you spend time with them to
8 check their proficiency on all the tools and requirements to
9 do their job.

10 Q. Okay. If we can pull up Exhibit 225.

11 And while we're doing that, Mr. Jones, I'll ask
12 you a couple questions.

13 So you said that -- or let me ask it this way.
14 Who goes out and evaluates track inspectors?

15 A. Typically the roadmaster.

16 Q. And how does it typically occur?

17 A. Probably they just schedule the day. Like I'm sure the
18 roadmaster says, "Hey, tomorrow I'm going to hi-rail with
19 you over the St. Paul sub." And we'll do the morning call
20 and set it on wherever, and we'll hi-rail. And let's stop
21 and measure this frog at this switch. Let's go up here and
22 let's check this cross-level spot and just do the different
23 various defects or procedures they're required to do. They
24 just probably perform them through their hi-rail on rail
25 inspection.

1 Q. So the roadmaster is actually physically riding along
2 with the track inspector watching what they're doing?

3 A. That is correct.

4 Q. If we can go to page 5 of Exhibit 225, please.

5 And on the bottom -- again, this is BNSF's
6 engineering instructions -- is a Section 2.2.2, Track
7 Inspector Evaluation. Do you see that?

8 A. Yes.

9 Q. So track inspector evaluations are something that are
10 required by BNSF policy?

11 A. Yes.

12 Q. If we go to page 6 -- to the paragraph on the top of
13 page 6 -- if we could blow that up. The last sentence in
14 this paragraph says: "The evaluation process involves
15 spending an entire day with the track inspector with a focus
16 on the quality of the overall inspection process."

17 Do you see that?

18 A. Yes.

19 Q. If we could go to Exhibit 4, please.

20 And what's Exhibit 4?

21 A. It looks like the form that they use for this evaluation
22 form.

23 Q. And if we look at the top of the first page, it gives a
24 date of January 28, 2013 and the roadmaster is Dale Johnson.

25 Do you see that?

1 A. Yes.

2 Q. And this is an opportunity for Mr. Johnson to follow
3 Mr. Sanders as he's doing his job and to provide him
4 feedback if he sees anything that is going awry.

5 A. They ride together. I wouldn't say follow. They're
6 riding together, in the truck together.

7 Q. This is the opportunity for the roadmaster to give
8 Mr. Sanders input or feedback on the quality of his overall
9 inspection process, right?

10 A. Correct.

11 Q. And if we could go to the second page of this exhibit,
12 please. And there's a bunch of red writing in the middle of
13 the page. If we could just blow up that bottom half under
14 the red writing, please.

15 So this is where the roadmaster actually gives
16 specific feedback when they're doing individual inspections,
17 right?

18 A. Where the comments are?

19 Q. Correct.

20 A. Yes.

21 Q. So if a roadmaster is concerned, for example, how an
22 inspector is using their tools or measuring a specific
23 defect, they can say it here, right?

24 A. Well, if you look at the top of that, it specifically
25 calls out turnout. So it's not the overall -- he picked

1 this specific Highway 100. This turnout said: Highway 100
2 back track looks good. So that particular spot the turnout
3 looked good based off of his comments.

4 Q. So you're saying that Mr. Sanders didn't do any
5 inspections to ensure that it looked good on this day?

6 A. I couldn't answer that based off of this. All it
7 said -- it didn't say Mr. Sanders performed or I watched him
8 perform a check of that frog, measure a switch point, check
9 the gauge through the closure, you know, all the required
10 checks. It just said: Highway 100 back track turnout looks
11 good. It didn't say Mr. Sanders did a great job on
12 inspecting that turnout at Highway 100. It says the turnout
13 looked good. It may be a brand-new turnout that was just
14 installed six months ago.

15 Q. It also doesn't say Mr. Sanders doesn't know how to
16 measure this turnout, right?

17 A. That's correct. Yeah, very minimal details on this
18 form.

19 Q. If we could go to page 4 of this form, please.

20 At the end of the document -- if we could blow up
21 that top half -- there's a section for general comments
22 under the roadmaster evaluation form, right?

23 A. Correct.

24 Q. And this is where, according to BNSF policy, roadmasters
25 are supposed to give inspectors feedback on the quality of

1 their overall inspection process, right?

2 A. Correct.

3 Q. And here we see some comments from Mr. Johnson that they
4 entered one slow order and Don has good curve notes and
5 staked. Do you see that?

6 A. Yes.

7 Q. Nothing about Mr. Sanders doesn't know how to do his
8 job, he doesn't know how to measure defects, he's
9 over-reporting defects? Nothing like that, right?

10 A. The only thing I would bring up on these comments, one
11 slow order for tie condition, which will be handled -- I
12 can't tell if they put that on that day or if it was already
13 out there. That would be my concerns with that write-up,
14 just not knowing all the details.

15 Q. My question was slightly different. Mr. Johnson's
16 comments don't say anything about how -- or allege that
17 Mr. Sanders doesn't know how to do his job, can't track
18 inspect, doesn't know what a defect is? Doesn't say
19 anything like that, right?

20 A. Not for that portion of track that they hi-railed for
21 that day and that specific timeline. I don't see anything
22 in there that would say that.

23 Q. Let's go to Exhibit 6. This is a track inspector
24 evaluation form for Mr. Sanders done by Luke Babler, who is
25 a different roadmaster, right?

1 A. Yes.

2 Q. The date on this one is February 21st of 2013.

3 Do you see that?

4 A. Okay. I can now, yes. That's correct.

5 Q. Then if we could go to page 4 of this exhibit where the
6 general comments are.

7 No comments about how Mr. Sanders can't do his
8 job, doesn't know how to track inspect, doesn't know how to
9 report defects, right? There's no comments at all?

10 A. Right. Based off this form, no.

11 Q. Let's go to Exhibit 7, please.

12 This is a track inspector evaluation form again
13 from Mr. Babler in March of 2013.

14 If we can go to page 4.

15 Again, no comments about Mr. Sanders being bad at
16 track inspecting, right?

17 A. Correct. Based off of that form, correct.

18 Q. Let's go to Exhibit 8.

19 Track inspector evaluation by William Schumake on
20 October 9th of 2013.

21 Do you see that?

22 A. Yes, sir.

23 Q. Let's go to page 4, please.

24 Here no comments about Mr. Sanders' ability to
25 track inspect, right?

1 A. Correct.

2 Q. Let's go to Exhibit 9.

3 Track inspector evaluation form for November of
4 2013, again by Mr. Schumake.

5 Do you see that?

6 A. Yes, sir.

7 Q. Okay. Let's go to page 4.

8 No comments alleging that Mr. Sanders doesn't know
9 how to track inspect, right?

10 A. That's correct.

11 Q. Let's go to Exhibit 10.

12 Track inspector evaluation form dated
13 December 26th of 2013 by Mr. Schumake.

14 Do you see that?

15 A. Yes, sir.

16 Q. If we can go to page 4.

17 Again, no comments that Mr. Sanders is a bad track
18 inspector, doesn't know how to measure track defects,
19 anything like that, right?

20 A. No, sir.

21 Q. Let's go to Exhibit 11, please. This is the final one.

22 Track inspector evaluation form from January of
23 2014, again by Mr. Schumake, right?

24 A. Yes.

25 Q. And if we can go to page 4.

1 No comments about Mr. Sanders' ability to track
2 inspect, right?

3 A. That is correct.

4 Q. From before 2015, is there any written document that you
5 can point me to that accused Mr. Sanders of not being able
6 to track inspect?

7 A. No. And I don't know, honestly, why we're going through
8 this. Nobody said he couldn't track inspect. There was a
9 few things that we coached him on that he may have been
10 classifying things different, but this isn't about him being
11 a good track inspector or not.

12 Q. These coachings -- prior to 2015, is there a written
13 document somewhere of these coachings that you gave to
14 Mr. Sanders, apparently?

15 A. It's just talking, spending time in the field saying,
16 "Hey, this is how you see it. Maybe this is how it is."
17 It's just hands-on, in the field working together.

18 There was no reason for documentation because
19 there was no concern about his track inspecting ability.
20 There was just things to get better on. There's things to
21 understand. The eye is a little bit better. Everything is
22 perception when we go out there and we hi-rail.

23 But one inspector may walk from mile post 5 to 6
24 and say there's 100 bad ties and everybody is going to get a
25 different count. Ties are subjective. Conditions are

1 different. How you measure a frog is way different on how
2 you hold your straight edge versus the feeler gauge. I
3 mean, everybody does things differently, and that's why it's
4 subjective.

5 We just work together to enhance it. We find new
6 processes through all different inspectors. There was never
7 a major concern with Don Sanders' track inspecting ability
8 or willing to come and do the job.

9 Q. Let me ask you something. Do track inspectors get an
10 annual review from their managers?

11 A. No. It's just through these forms and just on their
12 day-to-day. I mean, a lot of times these are kind of
13 required, just something for tracking purposes, because if
14 you don't have a standard, some FLS roadmasters maybe won't
15 go out and do this because they're newer or maybe they don't
16 understand how to do everything that Mr. Sanders could. So
17 maybe they feel intimidated to go out and hi-rail with that.

18 So there's other ways of going out. And this
19 isn't the only time they spent with track inspectors, was
20 just doing these. It was most of the seasoned -- the newer
21 or the seasoned would go out and hi-rail daily and may not
22 fill these things out just because they're wanting to learn
23 their territory or look at something different or put a plan
24 together with the inspector. So these were just the bare
25 minimum.

1 Q. These are the official written record of how Mr. Sanders
2 is performing; would you agree with that?

3 A. Yes. If you had a concern, this would be the place that
4 you'd want to say, "Hey, I coached so-and-so on how to do
5 work, or cross-level, or measure, or other defects." You'd
6 want to capture that in here just to show that you are
7 spending time educating and training.

8 Q. We can take down Exhibit 11.

9 In 2015, we've alluded to the fact that
10 Ms. Hoppenrath becomes the roadmaster in Dayton's Bluff,
11 right?

12 A. Yeah, that's correct.

13 Q. And she was a first-time roadmaster?

14 A. Yes.

15 Q. And how did she perform that first year, in your view?

16 A. She had a lot to learn. She was learning the territory,
17 learning how to put things together. Very, very
18 high-tonnage traffic area at that time, so a lot of times it
19 was the adjustment of it seemed simple. I want to go remove
20 these defects, this, this, and this, but you may have so
21 much traffic that the operating team wouldn't allow you to
22 do your plan.

23 So she was working very, very hard to learn the
24 territory, learn the people, their skills, develop her
25 training, her leadership style, and then develop all of her

1 team along the way. So she was very busy and worked very
2 hard at trying to be the best that she could be.

3 Q. You referenced a second ago something called the
4 operating team. Do you remember that?

5 A. Yes.

6 Q. And that's separate from the maintenance team?

7 A. That is correct.

8 Q. Mr. Sanders and you are on the maintenance team?

9 A. That is correct.

10 Q. The operating team is the team that's responsible for
11 actually moving trains from point A to point B?

12 A. That is correct.

13 Q. And you referenced the fact that at times the
14 maintenance team has difficulty getting on the tracks
15 because the operating team is trying to move trains, is that
16 right?

17 A. That is correct.

18 Q. Because that's how the company makes money is moving
19 trains?

20 A. That's a portion of it, yes.

21 Q. And there are times when the operating team tells the
22 maintenance team, "You can't get on the tracks right now
23 because we're trying to move trains"?

24 A. That is correct.

25 Q. And so as a track inspector, Mr. Sanders has an assigned

1 schedule for his job, right?

2 A. Yeah. For the most part, yes.

3 Q. But track inspectors always cannot actually get on the
4 track during that assigned schedule because the operating
5 team is trying to move trains, right?

6 A. That is correct.

7 Q. So track inspectors might have to come in on off
8 hours -- early in the morning, late at night -- in order to
9 do their required inspections, fair?

10 A. With the approval of the supervisor they come up with an
11 alternative schedule as needed, yes.

12 Q. And in 2015 there was a time when Mr. Sanders was doing
13 the work of both the main line and the yard inspector,
14 right?

15 A. That is correct.

16 MR. LUCAS KASTER: Your Honor, I'm switching gears
17 a little bit. I'm not sure -- do you want me to keep going?

18 THE COURT: How long do you anticipate this
19 section of your examination to last?

20 MR. LUCAS KASTER: Ten minutes.

21 THE COURT: Why don't we get through this and then
22 we'll call it a day.

23 MR. LUCAS KASTER: Sure.

24 THE COURT: All right. Thank you.

25 MR. LUCAS KASTER: Thank you.

1 BY MR. LUCAS KASTER:

2 Q. And Mr. Sanders' assigned job in Dayton's Bluff in 2015
3 was as a yard inspector, right?

4 A. I think that's the job that he was -- yeah, that he had
5 on bulletin. Yes.

6 Q. So that's his primary responsibility, is the yard
7 sections of track?

8 A. Yes.

9 Q. And in 2015 there was a period of time when there was no
10 main line inspector in Dayton's Bluff?

11 A. That is correct.

12 Q. And so Mr. Sanders was asked by you and Ms. Hoppenrath
13 to do the main line inspections as well?

14 A. That is correct.

15 Q. And because he was working both jobs, he was working a
16 lot of days, a lot of hours, right?

17 A. That is correct.

18 Q. Do you know how many days Mr. Sanders worked in 2015?

19 A. You know, I do not know. I heard the opening
20 statements. It was a lot.

21 Q. Do you recall Mr. Sanders working over 300 days in 2015?

22 A. Potentially is accurate. Like I said, I do not know
23 right offhand.

24 Q. If we could bring up Exhibit 21, please, and the summary
25 exhibit of Exhibit 21, please.

1 Mr. Jones, this is an exhibit that was produced to
2 us in this case which is Mr. Sanders' time entries.

3 Do you see that?

4 A. Yes.

5 Q. And it starts on May 1st of 2015, right?

6 A. Yes.

7 Q. And in May of -- can you read the dates in the second
8 column in from the left?

9 A. Yup.

10 Q. I know they're a little small.

11 But if we look at May of 2015, Mr. Sanders worked
12 all but four days in that month, right? If you look down
13 the days --

14 A. That's correct.

15 Q. -- he didn't work the 10th, the 15th or 16th, and the
16 24th, but he worked all other days, right?

17 A. Yes.

18 Q. Including he worked on May 25th of 2015. There's an
19 entry for a code 24. What is that?

20 A. I don't know if that's -- honestly, I don't know off the
21 top of my head.

22 Q. Is that holiday pay?

23 A. It would be. I think 12 is overtime, so it could be
24 holiday.

25 Q. Is that the Memorial Day holiday?

1 A. I would assume. I don't --

2 Q. If we can go down to June. We see on the bottom of this
3 page Mr. Sanders worked on June 1st. If we follow the days
4 going down in June of 2015, he worked all days but the 6th,
5 the 12th, the 13th, the 20th, and the 27th. So he worked
6 all but five days in June, right?

7 A. Very dependable individual, yes.

8 Q. Let's go to July. Mr. Sanders worked all but one day in
9 July. The day he did not work was the 16th. And he worked
10 the 4th of July holiday. Right?

11 A. Yeah. Yeah. Without scrubbing through each line, yes,
12 I would say that's probably accurate.

13 Q. And if we look at August, Mr. Sanders worked every day
14 in August.

15 A. (Reviewing). Yes. Yes, I would agree.

16 Q. And he worked every day in September.

17 A. (Reviewing).

18 Q. Do you see that, Mr. Jones?

19 A. Yes.

20 Q. Including Labor Day holiday.

21 A. Yes.

22 Q. And by the way, when Mr. Sanders is working this amount
23 of time, you're his division engineer, right?

24 A. That is correct.

25 Q. So you know he's working this much?

1 A. We had some conversations, yes, to make sure he felt
2 safe doing so and was willing to do it.

3 Q. If we scroll down to November, Mr. Sanders worked
4 Thanksgiving on November 26th.

5 Do you see that?

6 A. Yes.

7 Q. He worked the day after Thanksgiving on November 27th?

8 A. Yes.

9 Q. If we scroll down to December, Mr. Sanders worked the
10 day before Christmas, Christmas, New Year's Eve, and New
11 Year's Day, right?

12 A. Yes.

13 Q. During Mr. Sanders' employment, he actually asked
14 Ms. Hoppenrath and you for time off on the holidays, right?

15 A. I -- I would assume yes. I don't recall the actual
16 conversations.

17 Q. Do you recall a conversation with Mr. Sanders where he
18 told you he was being denied time off on the holidays?

19 A. I don't recall.

20 Q. Now, you told Mr. Sanders at one point that BNSF was
21 using him too much, right?

22 A. Yes.

23 Q. That he was the go-to track inspector in Dayton's Bluff?

24 A. That is correct.

25 Q. That he was, in your words, "not replaceable"?

1 A. That is true.

2 Q. If we can bring up Exhibit 214, please. This is a
3 recording. And I'm going to ask that we play the section at
4 10:12 to 10:58.

5 (Recording played, Exhibit 214)

6 BY MR. LUCAS KASTER:

7 Q. We can stop there.

8 Mr. Jones, is that your voice on that recording?

9 A. That is correct.

10 Q. Is that Mr. Sanders' voice on that recording?

11 A. Yes.

12 Q. Is that a conversation that occurred between you and
13 Mr. Sanders during Mr. Sanders' employment with BNSF?

14 A. It sounds familiar, yes.

15 Q. And you told Mr. Sanders he was "not replaceable,"
16 right?

17 A. Yes. That is correct.

18 MR. LUCAS KASTER: I'm done with this line of
19 questioning, Your Honor.

20 THE COURT: All right. I think it makes sense to
21 adjourn for the day. It's 5:10 and for some of the jurors
22 and for some of us it's been a long day, so we'll adjourn at
23 this point.

24 Members of the Jury, let me just remind you I gave
25 you a bunch of rules earlier today. I have no intention of

1 repeating all of them now, but you're about to leave the
2 courthouse for the first time since you've been impaneled as
3 a jury, and I just want to remind you that it is quite
4 important that you adhere to those rules that I gave you
5 earlier today.

6 We'll let you go now. Please understand we'll
7 resume at 9:00 in the morning, so please be here in enough
8 time to start promptly at 9 o'clock. Thank you again.

9 THE LAW CLERK: All rise.

10 (Jury excused)

11 **IN OPEN COURT**

12 THE COURT: All right. Please be seated.

13 Mr. Jones, if you were present here in court, I
14 would let you step off the witness stand and go back to
15 counsel table. Since you're attending there and observing
16 that way, I'll let you just remain on the screen here. I
17 think that makes the most sense.

18 Let me ask the lawyers, starting with Mr. Sanders'
19 counsel, is there anything that we need to be here for
20 before we begin again tomorrow morning at 9:00?

21 MR. JIM KASTER: We don't think so.

22 MR. LUCAS KASTER: No, Your Honor.

23 THE COURT: How about for BNSF?

24 MS. FERGUSON: No, Your Honor.

25 THE COURT: All right. Then please plan on being

1 here to resume with Mr. Jones' testimony at 9 o'clock
2 tomorrow, and we will adjourn for the day. Thank you.

3 (Proceedings concluded for the day at 5:13 p.m.)

4 * * * *

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C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE**, Official Court Reporter
for the United States District Court, do hereby
certify that the foregoing pages are a true and
accurate transcription of my shorthand notes,
taken in the aforementioned matter, to the best
of my skill and ability.

/s/ Timothy J. Willette

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